

CAROLINE BANNON)	
Claimant)	
VS.)	
)	
LIGGETT GROUP)	Docket No. 198,280
Respondent)	
AND)	
)	
ROYAL INSURANCE COMPANY OF AMERICA)	
Insurance Carrier)	

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board. In addition, the parties, at oral argument, stipulated that the September 30, 1996, letter from Dr. Robert Eyster should be considered as evidence before the Appeals Board.

ISSUES

- (1) Whether the Administrative Law Judge's denial of respondent's Motion for Reconsideration and to Reopen the Record subsequent to the Award of September 26, 1996, was error.
- (2) Whether claimant suffered accidental injury arising out of and in the course of her employment.
- (3) The date or dates of claimant's alleged accidental injury.
- (4) Whether claimant provided notice to the respondent pursuant to K.S.A. 44-520.
- (5) Claimant's entitlement to unauthorized medical treatment.
- (6) The nature and extent of claimant's injury and/or disability.
- (7) Claimant's entitlement to additional temporary total disability compensation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant alleges accidental injury arising out of and in the course of her employment with respondent on October 4, 1994, with a series of accidents and aggravations through January 6, 1995, claimant's last date of employment with respondent. This matter was originally before the Appeals Board on respondent's appeal from the April 11, 1995, preliminary Order of Administrative Law Judge Clark which granted claimant temporary total disability compensation and medical treatment. The Appeals Board's Order of July 19, 1995, reversed the Administrative Law Judge's Order, with the Appeals Board finding that claimant had failed to prove accidental injury arising out of and in the course of her employment on the original date of accident of October 4, 1994. This matter then came before the Administrative Law Judge for consideration of claimant's accidental injury which alleged a series of accidents through January 6, 1995. This Award by the Administrative Law Judge constitutes the matter currently in contention.

The Appeals Board will first consider respondent's appeal from the Administrative Law Judge's denial of respondent's Motion for Reconsideration and to Reopen the Record. A regular hearing was held on February 20, 1996, with appropriate terminal dates being set on March 20 and April 20, 1996, for the claimant and respondent, respectively. An agreed Order was then entered into on April 17, 1996, extending respondent's terminal date until May 20, 1996. Claimant took depositions through May 15, 1996, without the benefit of an extension but then later filed an additional request for an extension of time to present the

rebuttal testimony of Frank J. Kutilek, III, M.D., which was scheduled for May 21, 1996. Dr. Kutilek's deposition was actually taken July 26, 1996. Respondent contacted Robert Eyster, M.D., one of the claimant's treating physicians, regarding Dr. Kutilek's July 26 deposition opinion and received a response from Dr. Eyster on September 30, 1996. This response letter has been stipulated into evidence by the parties. On that same date, September 30, 1996, Judge Clark rendered his final Award. Respondent then filed its Motion for Reconsideration and to Reopen the Record and for Other Relief on October 11, 1996. A motion hearing was held December 17, 1996, and respondent's request was denied. Respondent contends the denial by Administrative Law Judge Clark was error and requests the Appeals Board order the Administrative Law Judge to reopen the record for the purpose of taking Dr. Eyster's deposition.

The Appeals Board rejects respondent's contentions for two reasons. First, the report of Dr. Eyster has been stipulated into evidence. A review of same indicates Dr. Eyster's opinion has in no way changed from the opinion expressed in his deposition on May 8, 1996. Second, it is noted that the Workers Compensation Act provides no procedure for an administrative law judge to reopen the record and reconsider his or her opinion once the final award has been issued. Absent a remand from the Workers Compensation Appeals Board as authorized by K.S.A. 44-551(b) or a Motion for Review and Modification under K.S.A. 44-528, there is no procedure authorizing an administrative law judge to reconsider his or her award. As such the Administrative Law Judge's denial of respondent's Motion for Reconsideration and to Reopen the Record is affirmed.

The Appeals Board will next consider whether claimant suffered accidental injury arising out of and in the course of her employment on the dates alleged. Claimant initially alleged that she suffered accidental injury on October 4, 1994, when lifting boxes of cigarettes. This contention is disputed by the medical evidence of Dr. Eyster whose medical office notes indicated that claimant alleged continuing problems for over a year when he first examined her on October 18, 1994.

She also contended that she advised respondent of this injury when talking to her supervisor, Larry Wells. Mr. Wells testified that he was never provided notice of any injury alleged by claimant while distributing cigarettes. He also testified that he contacted the various distributors with whom respondent did business and none were able to verify that claimant suffered any accidental injury while making deliveries to the various vendor locations.

Claimant also alleges that her back continued to worsen through January 6, 1995, while employed with respondent. However, Dr. Eyster testified that claimant suffered no change in the physical structure of her body between the October 4, 1994, original date of accident and her termination of employment on January 6, 1995. He felt that claimant's condition was a natural, direct, and probable result of her preexisting degenerative disc disease and her sciatic condition.

Perhaps the most damaging testimony to claimant's allegations of an on-the-job injury comes from Dr. Kutilek. The medical records of Dr. Kutilek indicate that claimant had been

suffering back, hip, and leg pain for up to a year before her alleged date of accident. In fact, as recent as September 23, 1994, claimant was in Dr. Kutilek's office receiving adjustments due to pain in her low back.

Finally, the Appeals Board notes the testimony of claimant herself regarding the alleged injury and her ongoing symptomatology. Claimant testified at both a preliminary hearing and the regular hearing regarding her history of back problems. She denied preexisting back pain before the October 4, 1994, incident, a denial which is clearly controverted by Dr. Kutilek's medical records. She denied ever having treatment for her back from Dr. Kutilek and alleged that Dr. Eyster was the first doctor she had ever seen for her back. Again this testimony is contradicted by the records of Dr. Kutilek. When claimant first saw Dr. Eyster she described an ongoing symptomatology which lasted for approximately one year. This history appears to be more in line with the medical records in evidence.

In proceedings under the Workers Compensation Act the burden of proof is on claimant to establish claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends. See K.S.A. 44-501 and K.S.A. 44-508(g). The claimant's burden must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

In order for claimant to be awarded benefits as a result of the alleged accidental injuries her testimony must be believed over the testimonies of her original supervisor, Mr. Larry Wells; her new supervisor, Ms. Trish Marcino; and over the medical records of both Dr. Eyster and Dr. Kutilek. Claimant's history when compared to the medical evidence and testimony from the other witnesses is seriously contradicted.

It is the function of the trier of facts to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of facts is not bound by medical evidence presented in the case and has the responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991). The medical evidence coupled with the lay testimony of Mr. Wells and Ms. Marcino convinces the Appeals Board that claimant has failed in her burden of proving that she suffered accidental injury arising out of and in the course of her employment with respondent on the dates alleged. As such, the Appeals Board must reverse the award of Administrative Law Judge Clark and deny claimant benefits. Additional issues raised by respondent are rendered moot by this finding.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated September 26, 1996, should be, and is hereby, reversed and an award of compensation is hereby denied claimant, Caroline Bannon, and against the respondent, Liggett Group, and its insurance carrier, Royal Insurance Company of America, for the accidental injuries alleged from October 4, 1994, through and including January 6, 1995.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

Deposition Services	
Transcript of regular hearing	\$167.10
Transcript of motion hearing	\$73.50
Alexander Reporting Co.	
Deposition of Pedro A. Murati, M.D.	\$306.85
Deposition of Ernest R. Schlachter, M.D.	\$228.65
Hanagan Reporting Service	
Deposition of Larry Wells	Unknown
Consolidated Reporters, Inc.	
Deposition of Trish Marcino	Unknown
Vivian D. Tilley	
Deposition of Cordelia Foust	Unknown
Bannon & Associates	
Deposition of Robert Eyster, M.D.	\$244.80
Deposition of George F. Stevens	\$110.00
Transcript of preliminary hearing	\$ 70.10
Deposition of Frank J. Kutilek III	\$385.00
Barber & Associates transcript of preliminary hearing	\$206.80

IT IS SO ORDERED.

Dated this ____ day of May 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
Clifford K. Stubbs, Lenexa, KS

John D. Clark, Administrative Law Judge
Philip S. Harness, Director